

Update

Employment Law

June 24, 2009

Employers Take Note:

Proposed workplace violence and harassment legislation will require new policies

Violence and harassment in Canadian workplaces are dilemmas of growing concern. According to a 2004 Statistics Canada survey, 17% of all self-reported incidents of violent victimization, including sexual assault, robbery and physical assault – representing over 356,000 violent incidents throughout Canada annually – occurred in the workplace.

Against that backdrop, on April 20, 2009, the Ontario Government introduced amendments to the *Occupational Health and Safety Act* (the “Act”) to address workplace violence and harassment. If passed, Bill 168 will:

- require employers to develop a framework that includes policies and programs to help prevent workplace violence and harassment;
- require employers to take reasonable precautions to protect their workers from domestic violence in the workplace; and
- allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence.

Defining “Workplace Violence” and “Workplace Harassment”

The following definitions are proposed to be added to the Act:

- “*Workplace Violence*” means (a) the exercise of physical force by a person against a worker in a workplace that could cause injury to the worker, (b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.
- “*Workplace Harassment*” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

It is noteworthy that the definition of “workplace violence” includes only physical injury and does not extend to psychological, emotional or other harm. Also, the definition of “workplace harassment” is much broader than the definition of “harassment” in the *Human Rights Code* in that “workplace harassment” may include comments or conduct unrelated to a prohibited ground of discrimination, such as age, disability, ethnicity and religion.

New Policies and Programs

Every employer will be required to prepare written policies with respect to both workplace violence and harassment, and post them in conspicuous places. The policies must be reviewed by the employer at least annually. Employers must train workers on these policies. Different requirements apply to workplaces with five or fewer workers.

Further, every employer must develop and maintain programs in order to implement their policies. These programs must include measures and procedures:

- to control the identified risks that are likely to expose any worker to physical injury (see the section below on the assessment of these risks);
- for summoning immediate assistance when workplace violence occurs, or is likely to

occur, or when a threat of workplace violence is made;

- for workers to report incidents of workplace violence and workplace harassment to the employer; and,
- setting out how the employer will investigate and deal with incidents and complaints of workplace violence and workplace harassment.

The Assessment of Risks

Bill 168 requires employers to assess the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work, and to conduct a re-assessment as often as is necessary to ensure the continued protection of workers from workplace violence.

Each risk assessment must take into account common risks at other similar workplaces and risks specific to the employer's workplace. A copy of the results of the risk assessment must be provided to the joint health and safety committee or health and safety representative, or, if there is no joint committee or representative, the workers must be advised directly.

Addressing Domestic Violence

The Bill also imposes a positive duty on employers to "take every precaution reasonable in the circumstances for the protection of the worker" if the employer becomes aware, or reasonably ought to be aware, of "domestic violence" that would likely expose a worker to physical injury in the workplace. Bill 168 is unique in that no Canadian jurisdiction in its occupational health and safety legislation or otherwise explicitly addresses domestic violence when it threatens to enter the workplace.

In its current form, Bill 168 does not include a definition of "domestic violence" nor does it explicitly take into account the privacy interests and expectations of workers or the sensitivity of interpersonal relationships. Consequently, an employer may encounter significant difficulties in assessing the potential risk for domestic violence where the situation arises initially outside of the

workplace and where the employer may not even be aware of the domestic circumstances of its workers. It is an open question whether workers will be expected to provide some advance notice to their employer of their personal situation before the employer's obligation under Bill 168 is triggered.

Disclosure of Persons with a Violent History

One of the more controversial aspects of Bill 168 is the requirement for employers to provide information to their workers about a person with a history of violent behaviour if:

- the worker can be expected to encounter that person in the course of his or her work; or,
- the risk of workplace violence is likely to expose the worker to physical injury.

Notably, this requirement only arises where there is a history of violent behaviour - as opposed to harassing behaviour - and a risk of physical injury.

This requirement may prove challenging for employers as there is no definition of a "history of violence" making it potentially difficult for employers to appreciate when this obligation may be engaged.

Right to Refuse Work

Workers already have a right to refuse dangerous work under the Act in situations involving dangers posed by equipment, machines, devices, things or the physical condition of the workplace. Bill 168 will amend the work refusal provisions of the Act to specifically include situations where the worker has reason to believe that he or she will likely be endangered by workplace violence.

Reporting Obligations

The Bill requires an employer to report and provide prescribed information on an incident of workplace violence to the joint health and safety committee.

Goodmans^{LLP} Update

What does this mean for employers?

If Bill 168 passes into law, which is expected to occur before the end of this year, employers will have six months after the day it receives Royal Assent to draft and implement appropriate policies and programs for their workplace. To summarize, to meet obligations arising under these amendments, employers should:

- undertake a risk assessment to determine the possibility of workplace violence or harassment, including a process of identifying persons with a history of violent behaviour;
- develop written workplace violence and harassment policies and post them;
- train employees on such policies;
- ensure the implementation of the policies;
- provide ways for workers to report instances or risks of workplace violence or workplace harassment, and to advise the employer of domestic situations;
- discipline workers who do not follow workplace violence and harassment policies or commit workplace violence or harassment; and,

- maintain detailed records of any workplace violence or harassment, investigation or work refusal.

Employers should also keep in mind that the existing penalties under the Act will apply to any breach of the amendments that come into force with Bill 168. In this regard, a person who contravenes or fails to comply with the provisions of the Act is guilty of an offence and, upon conviction, is liable to a fine up to \$25,000 or up to 12 months imprisonment, or both, for each event. A corporation may be fined up to \$500,000 for each offence.

If you have any questions with respect to the foregoing, please do not hesitate to contact:

Rebecca Burrows rburrows@goodmans.ca	416.597.4102
Joe Conforti jconforti@goodmans.ca	416.597.4177
Susan Garvie sgarvie@goodmans.ca	416.597.4141
Joe Morrison jmorrison@goodmans.ca	416.597.4203